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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1933.

No. 791-792

SEWELL LEE AVERY,

Petitioner,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,

Respondent.

SEWELL L. AVERY,

Petitioner,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF OF PETITIONER.

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BRIEF OF PETITIONER.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The United States Board of Tax Appeals confirmed deficiencies against petitioner of $101,269.78 and $2,658.13 for income taxes for the calendar years 1924 (R. 9) and 1929 (R. 50) respectively (R. 33; 63). Upon appeal to the United States Circuit Court of Appeals for the Seventh Circuit, the judgments of the Board were affirmed (R. 89; 99). Certiorari was granted here.

The cases were consolidated for hearing before the Board (R. 23; 52) and also in the court below (R. 81; 94).

OPINIONS BELOW.

The opinion below appears in the record at pages 87 and is also reported in 67 Fed. (2d) 310. The opini of the Board appears in the record at pages 23-33 a pages 52-62 and is otherwise unreported.

JURISDICTION.

The judgment of the Circuit Court of Appeals of t Seventh Circuit was entered on October 26, 1933 (R. 8 99) and petition for rehearing was denied on Novemb 21, 1933 (R. 90, 100). A petition for certiorari was file in this court on February 16, 1934, pursuant to Sectio 240-A of the Judicial Code as amended by the Act February 13, 1925, (Sec. 347, ch. 9, Title 28, U. S. C. A. Certiorari was granted on March 19, 1934.

STATEMENT OF THE CASE.

The cases were tried upon a stipulation of facts (R. 16; 20) and upon certain additional testimony (R. 20-33). The testimony related to the practice followed by the corporation whose dividends are here involved—United States Gypsum Company—in the transmission to its stockholders of its dividend checks (R. 20-22; 26-27). There is no dispute with respect to any of the testimony or as to any of the facts.

Petitioner is a stockholder of United States Gypsum Company. In November, 1924, that company declared a dividend upon its stock, payable on or before December 31, 1924 to stockholders of record at the close of business on December 5, 1924 (R. 17). Dividend checks were mailed out to the stockholders on December 31, 1924, excepting that in the case of about fifty employees at the principal office of the company in Chicago, including Petitioner, the checks were held by the treasurer and not delivered until January 2, 1925. Petitioner received his dividend checks aggregating $266,490.10 on January 2, 1925 (R. 19-20).

These dividends were reported by Petitioner as income for the year 1925 (R. 17).

In November, 1925, the company declared further dividends, payable on or before December 31, 1925 to stockholders of record at the close of business on December 5, 1925 (R. 17-18). The dividends were paid in the same manner as in the case of the 1924 dividends, and Petitioner accordingly received his dividend checks on January 2, 1926, aggregating $161,511.70 (R. 19-20). These dividends were included in Petitioner's 1926 return (R. 17-18).

In November, 1926, a dividend was declared payable on or before December 31, 1926 to stockholders of record at the close of business on December 4, 1926. The dividend was paid in the same manner, Petitioner receiving his dividend checks amounting to $140,117.30 on January 2, 1927 (R. 19-20), which dividends were included in Petitioner's 1927 return (R. 18).

These are the three dividend payments involved in No. 791.

In November, 1928, a dividend was declared, payable on or before December 31, 1928 to stockholders of record at the close of business on December 15, 1928 (R. 19). The dividend was paid in the same manner as before and Petitioner received dividend checks amounting to $32,656 on January 2, 1929 (R. 19-20) which were included in his 1929 return (R. 19).

In November, 1929, a dividend was declared, payable on or before December 31, 1929 to stockholders of record at the close of business on December 14, 1929 (R. 19). The dividend was paid in the same manner as before, Petitioner receiving checks aggregating $48,984 on January 2, 1930 (R. 19-20), which dividends were included in his 1930 return (R. 19).

These are the two dividend payments involved in No. 792. The Commissioner claims that the $32,656 should have been reported as income for the year 1928, and not for the year 1929; and that the $48,984 should have been reported for 1929, and not 1930.

Treating in each case the dividends in question as income for the year in which they were respectively declared and made payable and not as income for the year in which the dividend checks were actually received by Petitioner, respondent increased Petitioner's 1924 in-

come by the amount of said said dividends of $266,490.10; decreased his 1925 income by the amount of said last mentioned dividends and increased it by the amount of said dividends of $161,511.70; decreased his 1926 income by the amount of the last mentioned dividends and increased it by the amount of the said dividends of $140,117.30 (R. 9-12); and decreased Petitioner's 1929 income by the amount of the said dividends of $32,656 and increased it by the amount of the said dividends of $48,984 (R. 50).

The following table shows the years in which the dividends were reported by Petitioner, together with the years in which the respondent claims they should be reported:

Year	Return as Made	Return as Adjusted
1924	.....	$266,490.10
1925	$266,490.10	161,511.70
1926	161,511.70	140,117.30
1927[1]	140,117.30	.....
1928[1]	.....	32,656.00
1929	32,656.00	48,948.00
1930	48,984.00	.....

The foregoing adjustments resulted in the asserted deficiency of $101,269.27 for 1924, [No. 791] overassessments of $20,995.68 and $3,791.26 for 1925 and 1926, respectively (R. 10, 11), and the asserted deficiency of $2,658.13 for 1929. [No. 792.]

1. Petitioner's 1927 and 1928 returns are pending before the Department without any final audit thereof.

ASSIGNMENT OF ERRORS.

I. The Circuit Court of Appeals for the Seventh Circuit erred in affirming the judgment of the Board of Tax Appeals in each of the two cases.

II. The Circuit Court of Appeals for the Seventh Circuit erred in not holding that the dividends hereinbefore mentioned of $266,690.10 and $48,984, were income for 1925 and 1930 respectively, the years when said dividends were in fact received by Petitioner.

III. The Circuit Court of Appeals for the Seventh Circuit erred in not reversing the judgment and finding of the Board of Tax Appeals in each of the two cases.

SUMMARY OF ARGUMENT.

I. Both the 1924 and 1928 Revenue Acts provide that all items of gross income, including dividends, shall be included in the taxpayer's gross income for the taxable period in which received by him, excepting only where other methods of accounting are permissible. This latter exception is not involved in the instant case. The question here to be decided is whether certain dividends were taxable income to petitioner in 1924 and 1929, respectively, or in 1925 and 1930, respectively. The Commissioner claims that the dividends are taxable for the years first mentioned. The petitioner claims that they are taxable for the years last mentioned. Neither the 1924 nor the 1928 statute makes any distinction in reporting income as between dividends and all other items of income. These Acts differ in this regard from the 1921 Act which declared a special rule in Section 201(e) of that Act applicable to dividends alone and which Act in Section 213(a) expressly excepted dividends from the criterion of receipt, which criterion applied to all other items of income, except in the case of accrual accounting.

The dividends here involved were declared and made payable in 1924 and 1929, respectively. Dividend checks were sent out by the corporation on December 31st of each of the two years 1924 and 1929, which checks did not come into the possession of the petitioner until January 2, 1925 and 1930, respectively. Petitioner claims that the dividends were therefore "received" by him in 1925 and 1930, respectively, and should be reported accordingly. He did in fact report the dividends for those years. The Commissioner claims that the dividends were constructively received by petitioner in 1924 and 1929, respectively, because of the fact that the dividends were declared and made payable in those years. His conten-

tion is founded upon certain regulations issued by him to the effect that dividends are to be regarded as constructively received when made unqualifiedly subject to the taxpayer's demand. These regulations adopted in substance the special provisions of Section 201(e) of the 1921 Act.

The word "received" in the 1924 and 1928 Acts is free from ambiguity and admits of no interpretation as is here attempted by the Commissioner. Petitioner received the dividends in question in fact in 1925 and 1930, respectively. The statute furnishes the sole measure as to when the dividends are to be reported. Under circumstances like those here involved, the First Circuit has held that the dividends are returnable in the year when the dividend-checks actually come to hand. (*Commissioner* v. *Adams*, C. C. A. 1, 54 Fed. (2d) 228). The decision of the Sixth Circuit in *Commissioner* v. *Bingham*, 35 Fed. (2d) 503, in principle supports petitioner's contention because the decision there was expressly founded upon the special provisions of Section 201(e) of the 1921 Act. The decision in the instant cases and in *Shearman* v. *Commissioner*, C. C. A. 2, 66 Fed. (2d) 256, are to the contrary.

II. The doctrine of constructive receipt is not applicable. The regulations under the 1921 Act embody in the subject of constructive receipt the substance of the provisions found in Section 201(e) of the 1921 Act. Whether such regulations correctly expounded the doctrine of constructive receipt as applied to dividends is immaterial as the regulations simply incorporated the statute itself and the regulations have only such meaning as the statute itself has. Section 201(e) of the 1921 Act did not deal with the question of constructive receipt but declared an arbitrary measure for taxing dividends, separate and distinct from all other items of income. Actual or constructive receipt of the dividend under the

1921 Act was immaterial. It was only necessary that the cash or property should be made unqualifiedly subject to the shareholder's demand. Under the 1921 Act, according to the *Bingham* case, the mailing of the dividend check was relevant only as to the fact as to whether the cash or property was so unqualifiedly subject to the shareholders demand.

The special provisions of Section 201(e) of the 1921 Act were omitted from the 1924 and subsequent Acts. Nevertheless, the Commissioner carried forward into his regulations under these later Acts the same provision as appeared in his regulations under the 1921 Act. The difference now is that such regulations no longer have the express support of the statute. The 1924 and subsequent Acts changed the law as to the reporting of dividends. The regulations issued under these later Acts as here sought to be applied by the Commissioner are therefore void as in violation of the statute. The Commissioner has no power to legislate under the guise of regulations. The essence of the doctrine of constructive receipt is that the fund is actually within the dominion and control of the taxpayer and it is only due to his own voluntary act or conduct that such income is not actually reduced to possession. It is not to be confused with accrual accounting. Here, while the dividends were due on December 31st and petitioner thereafter, if the same were not paid, could maintain an action against the corporation therefor, the corporation chose to make payment by delivery of the dividend checks in such manner as to preclude their receipt by the shareholders until January of the following years respectively. This delay in the transmittal of the dividend checks was not due to the voluntary act or conduct of petitioner or of the other stockholders and therefore they cannot be said to have constructively received the dividends prior to the date of their actual receipt when the dividend checks actually

came to hand. The cases where dividends and other items of income have been credited to the taxpayer's account upon the corporate books upon which account the taxpayer has the right to draw at will, are clearly distinguishable from cases like the present.

III. The instant case which involves the largest deficiency—$101,269.27—arises under the 1924 Act.

The *Shearman* case rested upon a principle of statutory construction not entirely applicable to No. 791, that is, a case arising under the 1924 Act. The power given to the Commissioner to issue regulations for the administration of the Act is not of itself power to the Commissioner to change or vary the meaning of the statute. Where a statute is clear and free from ambiguity, the Commissioner has no power to change it by administrative construction no matter of how long standing such administrative construction may have been. The word "received" in the statute is not ambiguous. While under the 1924 and subsequent Acts, dividends as well as other items of income may under proper circumstances be regarded as constructively received, the Commissioner in applying that doctrine may not exercise arbitrary or unreasonable power and it is for the courts to decide whether the doctrine has been correctly applied.

The Commissioner here has injected into the 1924 and subsequent Acts by a process of administrative construction the very provisions of the 1921 Act which were omitted from the later Acts. Either the present regulations as sought here to be applied are void as transgressing the powers conferred upon the Commissioner, or else Section 201 (e) of the 1921 Act was wholly superfluous and the decision in the *Bingham* case was founded upon an entire misconception of the 1921 Act.

The Commissioner may not legislate under the guise of administrative regulations.

ARGUMENT.

I.

THE DIVIDENDS OF $266,490.10 AND $48,984.00 WERE RECEIVED ON JANUARY 2, 1925, AND JANUARY 2, 1930, RESPECTIVELY, WHEN THE DIVIDEND CHECKS ACTUALLY CAME TO HAND. UNDER BOTH THE 1924 AND 1928 REVENUE ACTS, THEY WERE TAXABLE INCOME IN THOSE YEARS RESPECTIVELY AND NOT IN 1924 AND 1929.

There is no question but that the resolutions under which Petitioner received his dividends provided that the dividends were payable on or before December 31st of the years 1924 and 1929. The fact remains, however, that the dividend checks themselves did not come into his possession until 1925 and 1930 respectively. The question then is as to whether these dividends under the circumstances were "received" by petitioner in 1925 and 1930 or in 1924 and 1929 within the meaning of Section 213 (a) of the 1924 Act and Section 42 of the 1928 Act. It is our contention that the Statutes are plain in meaning and free from ambiguity, and that neither case is one for the application of the doctrine of constructive receipt.

Aside from the case of *Commissioner* v. *Bingham*, C. C. A. 6, 35 Fed. (2d) 503, which involved special dividend provisions found only in the 1921 Act, there have been three decisions of the United States Circuit Court of Appeals upon the general question involved — *Commissioner* v. *Adams*, C. C. A. 1, 54 Fed. (2d) 228; *Shearman* v. *Commissioner*, C. C. A. 2, 66 Fed. (2d) 256, and the instant cases. The *Adams* case supports Petitioner's

contentions, whereas the decision below and the decision in the *Shearman* case are opposed.

The applicable Statutes are Section 213 (a) of the Revenue Act of 1924, and Sections 22 and 42 of the 1928 Act.

Section 213 (a) of the Revenue Act of 1924 provides:

> "The term 'gross income' includes gains, profits and income derived from salaries, wages or compensation for personal service * * *; also from interest, rents, dividends, securities * * * or gains or profits and income derived from any source whatever. The amount of all such items shall be included in the gross income from the taxable year in which **received** by the taxpayer, unless under methods of accounting permitted under Subdivision (b) of Section 212[1] any such amounts are to be properly accounted for as of a different period."

Section 22 of the 1928 Act provides:

> "'Gross income' includes gains, profits and income drived from salaries, wages or compensation for personal service * * *; also from interest, rents, dividends, securities * * * or gains or profits on income derived from any source whatever."

Section 42 of the 1928 Act provides:

> "The amount of all items of gross income shall be included in the gross income for the taxable year in which **received** by the taxpayer, unless under methods of accounting permitted under Section 41[2] any such amounts are to be properly accounted for as of a different period."

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1. Subdivision (b) of Section 212 provides:
"The net income shall be computed upon the basis of taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer, but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income * * *".

2. Section 41 of the 1928 Act is identical with Section 212 (b) of the 1924 Act.

Both the 1924 and 1928 Acts require that the income be *received.*[1]

Apart from accrual accounting, our income tax laws have consistently taxed income upon the basis of receipt. This was likewise the case of the Corporation Tax Law of 1909. The Act of October 3, 1913, used the words "arising or accruing" (38 Statute L 106 in Sec. A, Subn. 1), but these words were construed as equivalent to "received". *Maryland Casualty Company* v. *U. S.*, 251 U. S. 342.

The Revenue Act of 1921 provided special treatment for dividends. Section 213 (a) of that Act defined gross income substantially as in the equivalent sections of the later Acts and provided for reporting income for the taxable year in which received "(except as provided in Subdivision (e) of Section 201)".

Said Section 201 (e) provided:

> "For the purpose of this Act, a taxable distribution made by a corporation to its shareholders or members shall be included in the gross income of the distributees as of the date when the cash or other property is unqualifiedly made subject to their demands."

Neither the 1924 nor any of the later Acts contains any provision equivalent to the section last mentioned.

There is no case in this Court involving the precise question, although this Court has said with reference to some of the earlier Acts that the date of payment of a dividend is the date of its receipt as distinguished from the date the dividend is declared. *Mason* v. *Routzahn*,

1. The 1924 and all subsequent Revenue Acts recognizes accrual accounting. Under such a system, receipt is not the controlling factor. Petitioner here is upon the cash receipts and disbursements basis. He is not, therefore, subject to tax upon any theory of accrual. The subject of accrual accounting is discussed in *U. S.* v. *Anderson*, 269 U. S. 422.

275 U. S. 175. Also in speaking generally, this Court has said with reference to some of the earlier Acts that net income was determined "by deducting from gross income received, interest, expenses and taxes actually paid and losses actually sustained". *United States* v. *Anderson*, 269 U. S. 422 at page 438. We submit that the use of the word actually suggests the thought that the imposition of income taxes upon a taxpayer reporting income upon a cash receipts and disbursement basis is rested upon actualities of receipt and disbursement and not upon fiction.

The question is prompted as to when these dividends were "paid" by the corporation and when they were "received" by the taxpayer. Certainly at first blush it would seem that neither a dividend nor any debt is paid by the corporation or debtor, as the case may be, nor is it received by the shareholder or creditor until the money owed actually comes to hand or at least the shareholder or creditor acquires actual possession of whatever medium of payment is adopted by the corporation or debtor, and even then there is no payment or receipt except upon the assumption that the medium of payment such as the dividend check is honored in due course. In other words, a dividend is not technically paid merely by the sending out from the corporation offices of a check for the amount of the dividend. On the other hand, when that check actually comes into the possession of the shareholder, the dividend, we submit, may be regarded as received conditioned obviously upon the subsequent honoring of the check.

The Court below (R. 88-89) refers to the regulations issued under the 1924 Act as dealing with the subject of constructive receipt of dividends but concludes as follows:

"We conclude that the weight of the argument is

> in favor of the conclusion that a stockholder of a corporation which has declared a dividend payable before a certain date, is on said date entitled to the sum thus declared as a dividend. His right thereto is traceable to the corporate action declaring the dividend, not to the check. The latter merely evidences the liability. It does not create the liability. The date the liability attaches, rather than the date of the check which evidences the liability, governs."

That a shareholder upon the payable date of the dividend is entitled thereto is, of course, obvious. This is because the declaration of a dividend creates a debt from the corporation to the shareholder and when the day arrives for payment the debt, like any other debt, is due and if not paid may be recovered by the shareholder in any appropriate action. And we quite agree with the Court below that the shareholder's right is traceable to the corporate action declaring the dividend and not to the check. Obviously, the shareholder's right to the dividend arises from the fact that the dividend has been declared. We have never contended that the shareholder's right to the dividend is traceable to the dividend check. We disagree, however, with the court below in the statement that the check "evidences the liability". The check has nothing to do with the liability beyond the fact that it is the means adopted by the corporation for payment. We therefore agree with the court that the check does not create the liability.

The essence of the decision of the Court below, however, is found in the last sentence of the opinion, wherein it is said: "the date the liability attaches, rather than the date of the check which evidences the liability, governs." In other words, dividends are to be regarded as received by the shareholder on the day they are due and payable without any further action of any kind by any of the parties. Under the view thus expressed, the

dividend checks might be sent out in the year following and still the shareholder is to be regarded as having received the dividends in the preceding year. Neither the Board nor any other Court has carried the doctrine of receipt to any such extent. Even under the 1921 Act, there must be some requisite showing either by the mailing of the dividend check or otherwise that the cash was available to the shareholder, and even under the Commissioner's view under the 1924 and subsequent Acts, the mailing of the check is requisite before the dividend is to be regarded as having been constructively received.

The fact that a dividend or other debt constituting income is due and payable on December 31st of a given year and the corporation or debtor sees fit to deposit in the mails on that day a check for the payment of such dividend or debt does not constitute a receipt of the check or of the dividend or of the debt upon December 31st or at any other time until at least the check comes into the actual possession of the shareholder or creditor.

Obviously many things could intervene to the detriment of the shareholder or creditor. If the check were lost in transit, certainly the corporation or debtor would not have discharged its or his liability as against the shareholder or creditor. Were the corporation or debtor to become insolvent in the interim, certainly the claim of the shareholder (to the extent it would be enforceable at all) or of the creditor would not have been destroyed.

The 1924 Act and all of the subsequent Acts create but one rule with respect to all kinds of income. There is no special treatment given to dividends as distinguished from interest or rent or other gains or profit. All income *must,* not may, be included in the taxpayer's income for the taxable period when received. In *Park* v. *Gilligan,* 293 Fed. 129, it was said:

"It is well settled that the declaration of a divi-

> dend creates a debt from the corporation to its stockholders. If the amount of the dividend be segregated and set apart from the other corporate assets, in money or securities or other property, then the same becomes a trust fund, for the benefit of the shareholders respectively. But that does not seem to have been done in this case. Therefore the crediting of the pro rata shares of the plaintiffs, G. F. Park and Susan F. Park, of this amount to their respective accounts upon the books of the company merely evidenced the indebtedness of the company to them and did not constitute the receipt of income by them. Income means actual cash or its equivalent received, as opposed to contemplated revenue due or unpaid."

The generality of language in the next to the last sentence above quoted may be questioned in the light of those cases where under certain circumstances the doctrine of constructive receipt is applied to dividends, interest, salaries, etc., credited upon the company's books with the unrestricted right of the taxpayer to draw thereon at any time. Yet the underlying conception of the court as to income received cannot, we submit, be successfully challenged. In *Mutual Benefit Life Ins. Co.* v. *Herold,* 198 Fed. 199, involving the Corporation Tax Act of 1929, the court said with reference to the meaning of the word "received" (pp. 214-5):

> "This language seems clearly to indicate that the net income, which is the measure of taxation, means what has actually been received, and not that which, although due, has not been received but its payment for some reason deferred or postponed. * * *
>
> Since, then, the language of the act is explicit in permitting only such deductions from the gross income as were actually paid during the current year, it would be strange, indeed, if on the opposite side of the account the company were charged with what it had not received during the current year. No reason appears or has been suggested for so radical and unwarranted a departure. Furthermore, the word 'income' means, as already shown, that which has

> come in, and not that which might have come in, but did not. If expenditures means what has been paid out, or outgoes, then income means what has come in, or receipts."

In *United States* v. *Schillinger,* 14 Blatch. 71, Cases No. 16228, cited in the *Herold* case, it was said:

> "That in the absence of any special provision of law to the contrary, income must be taken to mean money, and not the expectation of receiving it, or the right to receive it, at a future time."

That the Congress may, as it did in the 1921 Act, declare a special rule as to dividends in determining the taxable period with respect to which they are taxable may be assumed for the purposes of the present discussion. Such a special rule was sustained in *Commissioner* v. *Bingham,* C. C. A. 6, 35 Fed. (2d) 503. But the court there was careful to point out, as will appear later on, that under the 1921 Act, the time when the dividend was received was not controlling provided only that the dividend was in fact at some time received. The 1921 Act made as the determining factor the time when the cash or other property was made available to the shareholder. And the Sixth Circuit held that the mailing out of the dividend check was relevant only as evidence that, at the time of mailing, the cash for payment of the dividend was available to the shareholder.

The special rule of the 1921 Act, however, is not the rule applicable to dividends or to any type of income under the 1924 and subsequent Acts.

Emphasis will be laid, we assume, upon what is called the Legislative History of the 1924 Act with respect to the omission of the provision found in Section 201 (e) of the 1921 Act, and the asserted relation thereof to the doctrine of constructive receipt found in the regulations under the 1924 and subsequent Acts as applied to cor-

porate dividends and especially as sought to be applied in the instant cases.[1]

The legislative history, so-called, consists of certain statements made in Committee reports relating to the 1924 Act.

They show that the 1924 Act when first introduced in the House and Senate had added a provision to Section 213 (a) declaring that all items of income should be considered to be received in the taxable year in which they were unqualifiedly made subject to the demands of the taxpayer, and that the provision appearing in Section 201 (e) of the 1921 Act was wholly omitted. The reports further indicate that in conference the proposed addition to Section 213 (a) was dropped and it was said that the provision stated the rule which was and should be followed in such cases even without the inclusion of the provision in the statute and that the provision had been intended to require "dividends, bond interest, and salaries, such as drawing accounts, to be included in income" when subject to demand by the taxpayer even though not actually received in cash by him. It may be that the various committee members thought that the proposed new matter in Section 213 (a), as well as Section 201 (e) of the 1921 Act, dealt entirely with the doctrine of constructive receipt. But upon that theory, had the proposed new matter been retained, Section 213 (a) would have been reduced to an absurdity as requiring first, that all items of income should be reported as income when "received" and then, second, that all such items of income should be reported as income when "constructively" received. Obviously if that was the meaning of the new matter, it was properly omitted.

1. *Shearman* v. *Commissioner*, C. C. A. 2, 66 Fed. (2d) 256, went off upon the proposition that the enactment of the 1926 and later Acts was an adoption of the regulations issued under the 1924 Act.

The doctrine of constructive receipt is not found in the statute but rests upon administrative practice. Are we to understand that had Section 201 (e) of the 1921 Act not been enacted, the Government would claim that dividends could not be taxed if constructively received only? Or that, that section having been enacted, it was meaningless and nugatory? In the absence of statutory provision, there is no such inherent difference between dividends and other items of income which requires difference of treatment from the standpoint of constructive receipt. It is a mistake, therefore, to permit the issue to be clouded by viewing Section 201 (e) of the 1921 Act as dealing with dividends merely from the standpoint of the doctrine of constructive receipt. If that section was intended for no other purpose than to subject dividends to tax if constructively received, the section was not only superfluous but under established principles of statutory construction all other items of income might properly be regarded as exempt from tax under any theory of constructive receipt. *Expressio unious est exclusio ulterius.* We do not think that any such intention should be attributed to the Congress in the enactment of the 1921 Act.[1] In view, how-

1. That dividends may be constructively received wholly apart from a provision like that in Section 201 (e) of the 1921 Act is apparent from *Hadley* v. *Commissioner*, App. D. C., 36 Fed. (2d) 543; *Brooks* v. *Commissioner*, C. C. A. 4, 35 Fed. (2d) 178; both involving statutes prior to the 1921 statute. In our above statement, we have in mind certain Committee reports made to the 67th Congress in connection with said Section 201 (e) of the 1921 Act. Reference to these reports appears in the opinions of the Board in *Robert W. Bingham*, 8 B. T. A. 603, beginning at page 605. Section 201 (e) of the 1921 Act if intended to deal with constructive receipt is not only awkwardly but inaccurately worded. The section must be taken as it stands and cannot be regarded as dealing with constructive receipt. Cf. *Commissioner* v. *Bingham*, C. C. A. 6, 35 Fed. (2d) 503. It appears from the majority opinion of the Board in the *Bingham* case that the Government was then contending that under the 1921 Act dividends were taxable in the year in which they were payable (8 B. T. A. p. 606). But obviously income is not "received" either actually or constructively merely because due and payable. In accrual accounting, the dividend probably accrues when declared without reference to when it is payable. Cf. *United States* v. *Anderson*, 269 U. S. 422.

ever, of the importance placed upon the matter by the Government and its effect upon the Second Circuit in the *Shearman* case, we deem it advisable to draw the court's attention to the state of the prior law.

The 1918 Act in Section 213 (a) required all items of gross income to be reported "for the taxable year in which received by the taxpayer". Section 201 (a) defined the term dividend as any distribution "made" by a corporation whether in cash or in other property or in stock of the corporation out of its earnings or profits accumulated since February 28, 1913. Subdivision (b) of Section 201, provided that any distribution should be deemed to have been made from earnings or profits, unless all earnings and profits should first have been distributed, and that any distribution made in the year 1918 or in any subsequent year should be deemed to have been made from earnings or profits accumulated since February 28, 1913. Subdivision (c) of Section 201, declared that a dividend paid in stock of the corporation should be considered income to the amount of the earnings or profits distributed. Subdivision (d) of Section 201, provided that a stock dividend received by a taxpayer between January 1 and November 1, 1918, both inclusive, or bona fide authorized or declared and entered on the books of the corporation during such period and received by a taxpayer after November 1, 1918, and prior to the expiration of thirty days after the passage of the Act, should be taxed at the rate prescribed by law for the years in which the corporation accumulated the earnings or profits from which the dividend was paid, and that the dividend be deemed to have been paid from the most recently accumulated earnings or profits. Subdivision (e) of Section 201, made further provision as to the earnings or profits under which any distribution should be deemed to have been made. As distinguished from stock

dividends, cash dividends were not subjected to different rates depending upon the time when the earnings or profits were accumulated out of which the dividends were paid. However, under the Excess Profits Tax Law, the question as to the earnings or profits out of which the dividend was paid was of large importance because of the question of invested capital which was involved.

The Statute, as we have said, defined dividends as any distribution "made" by a corporation. The Commissioner took the view that a distribution "made" meant a dividend "paid" as distinguished from declared, and also that the word "paid" meant paid or accrued depending upon the particular method of accounting used by the taxpayer. Article 23, Reg. 45 (1918).

Article 1541 (Reg. 45) provided that "the mere declaration of the dividend is not a distribution", followed by the statement that "dividends are income and are taxed at the rates for the year in which paid regardless of when the earnings or profits out of which they are paid were accumulated". Article 54 (Reg. 45) provided that "dividends on corporate stock are subject to tax when set apart for the stockholders although not yet collected by them".[1]

1. Section 31 (b) added to the 1916 Act by the Revenue Act of 1917 provided that any distribution "made" to the shareholders in the year 1917 or subsequent years should constitute a part of the annual income of the distributee "for the year in which received", and that it should be deemed to have been made from the most recently accumulated undivided profit or surplus, and should be taxed at the rates prescribed by law for the years in which the profits were accumulated. Some of the lower courts had held that a distribution was "made" when the dividend was declared and that the date of payment was immaterial (*Plant* v. *Walsh*, 280 Fed. 722; *Mason* v. *Routzahn*, 8 Fed. (2d) 56; *Philips* v. *U. S.*, 12 Fed. (2d) 598). *Mason* v. *Routzahn*, *supra*, was subsequently reversed by the Sixth Circuit Court of Appeals (13 Fed. (2d) 702), but was affirmed by this court. The Sixth Circuit, however, held that the word "made" meant payment and not a mere declaration of the dividend. This court approved that holding saying: "It (the Statute) declared that the dividend is income of the shareholders in the year in which it is 'received'. We think it clear that for this purpose the date of payment not the date of the declaration of the dividend is the date of distribution." (*Mason* v. *Routzahn*, 275 U. S. 175.)

The above is therefore the administrative practice which, as we understand it, is claimed to have been adopted by the enactment of Section 201 (e) of the 1921 Act. We submit that the claim will not stand analysis.

Section 201 (e) of the 1921 Act did not follow the language of Article 54 of Regulations 45. It provided, as we have said:

> "For the purpose of this Act, a taxable distribution made by a corporation to its shareholders or members shall be included in the gross income of the distributees as of the date when the cash or other property is unqualifiedly made subject to their demands."

and Section 213 (a) expressly excepted dividends from the criterion of receipt as determining the accounting period with respect to which they were subject to tax.

Bingham v. Commissioner, 8 B. T. A. 603, arose under the 1921 Act and was decided by the Board of Tax Appeals in 1927. The doubt and confusion on the question starts with that case, and results, we submit, from the failure to appreciate the significance and effect of Section 201 (e) of the 1921 Act. In that case Bingham received a number of dividend checks on January 2, 1923. The checks were drawn on December 30th and 31st, 1922, in payment of dividends declared during 1922 and payable on or about December 31st of that year. The checks were mailed from the various corporation offices on December 30th and 31st, 1922. The Board by a bare majority, and in spite of Section 201 (e), held that the dividends were taxable in 1923, the year in which the dividend checks were actually received. Seven members of the Board dissented. It was said in one of the dissenting opinions (p. 610) that the majority construction rendered Section 201 (e) entirely superfluous and that without it, "a taxpayer recipient of corporate dividends would report

it by that decision exactly as he reports all other income". It was further said with reference to the express exception of dividends from Section 213 (a) that it "is a clean, clearcut declaration on the part of Congress that it did not intend that corporate dividend income should be absolutely controlled, in reporting same, by the taxpayer's accounting method. All other income may be so reported, but dividends are expressly excepted from such control". (pp. 610-611.) In the dissenting opinion of Mr. Phillips, it was said "that the provisions of the Act do not make dividends taxable when declared but only when 'cash or other property in unqualifiedly made subject to their (stockholders') demands'. The language is not equivalent to a declaration that dividends are taxable when declared or even when payable unless, in the latter case, the money or other property to be distributed is available. It would seem that the purpose of the regulation referred to in the Finance Committee report was to require that dividends should be reported in the year in which they became payable, if payment was available."[1]

On appeal to the Sixth Circuit Court of Appeals, the judgment of the Board was reversed. *Commissioner* v. *Bingham*, C. C. A. 6, 35 Fed. (2d) 503. That court gave controlling effect to Section 201 (e) saying:

> "* * * Section 213 (a) as applicable to the respondent's return, he having kept his books upon the receipts and disbursements basis on the calendar year period (Section 212 (b)), provides generally that gross income for tax purposes shall be allocated to the year in which received, but, by specific exception inserted in that section in parenthesis, taxable distributions made by corporations to its shareholders (dividends) are excluded from such provision.

1. This reasoning is to be compared with that of the court below, which was in effect, that under the 1924 and 1928 Acts without the aid of any provision similar to that of Section 201 (e) of the 1921 Act, dividends are taxable in the year when payable, without more. (R. 88-9).

> The reason for such exclusion of course was that an entirely different basis for fixing the tax year for dividends had already been established in Section 201 (e) which section must control. * * *
>
> The important thing is that the shareholder did receive a dividend, *not when or how.* Having received it, the statute (Section 201 (e)) required that it be included in his gross income as of the date, *not when received* but when the cash (for this was a cash dividend) was unqualifiedly made subject to his demand." (Italics ours.)

The Sixth Circuit further pointed out that the only relevancy of the fact of the mailing of the checks was that it was evidence that the cash was then unqualifiedly subject to the stockholder's demand.

Nothing in the opinion of the Sixth Circuit Court of Appeals in the *Bingham* case suggests that the decision rested upon any doctrine of constructive receipt or upon anything other than the express provisions of Section 201 (e). In fact Section 201 (e) does not deal with dividends from the standpoint of either constructive receipt or accrual accounting. It declares a special statutory rule applicable only to dividends and not to any other type of income. By virtue of Section 213 (a) dividends are excepted from the general operation of accrual accounting as well as of the cash receipts and disbursements basis.

Certiorari was denied by this court in the *Bingham* case.

Regulations 62 issued under the 1921 Act in Article 1541 thereof adopted verbatim the statutory language found in Section 201 (e) of the Act. Article 53 adopted substantially the same language though with some change of phraseology.[1]

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1. "Article 53— * * * Dividends on corporate stock are subject to tax when unqualifiedly made subject to the demand of the stockholder". It is doubtful if the change in phraseology intended a change in meaning as express reference was made to Section 201 of the Statute and to Article 1541 of the Regulations.

The regulations issued under the 1921 Act obviously can be sustained inasmuch as they merely incorporate the provisions of the Act itself upon the subject. The fact that the regulations are dealt with by the Commissioner under the general theory of constructive receipt is wholly immaterial. The regulations mean whatever the statute means. They are valid because they have the support of the statute, not because, apart from the statute, they constitute proper application of the doctrine of constructive receipt.

The 1921 Revenue Act was repealed and the 1924 and 1926 Acts were both enacted in which the provisions of Section 201 (e) of the 1921 Act were omitted long prior to the decisions of the Board and of the Sixth Circuit Court of Appeals in the *Bingham* case.

Notwithstanding the omission of the provisions of Section 201 (e) of the 1921 Act from the 1924 Act, the Commissioner carried forward into Regulations 65 issued under the 1924 Act the identical provisions with respect to the taxing of dividends as had been included in Regulations 62. Obviously, and in its final analysis, this could only be justified upon the theory that Section 201 (e) of the 1921 Act was wholly surplusage and meaningless—otherwise the Commissioner in Regulations 65 was injecting into the law something not found in the statute and not warranted by it. In other words, the Commissioner was engaging in a process of legislation through the guise of administrative regulation.

Commissioner v. *Adams* was decided by the Board (20 B. T. A. 242) in 1920 and by the First Circuit, 54 Fed. (2d) 228, in December, 1931. The situation there was similar to that in the *Bingham* case excepting that the dividend resolution expressly provided that the dividend checks should be mailed out on December 31st. The case arose under the 1924 Act.

The Board held for the taxpayer on the ground that the dividends were not received until the dividend checks came to hand. The decision was rested upon two grounds —first, that the dividend resolution required the dividend checks to be mailed on December 31st, and the *Bingham* case was therefore distinguishable; and second, because of the omission from the 1924 Act of the provisions found in Section 201 (e) of the 1921 Act. It was said (20 B. T. A. 242, p. 246) that "Congress intended that even under the 1924 Act there might be a constructive receipt of dividends which would make such dividends taxable to the stockholder prior to the date upon which he actually received them"[1] and that, in general, "income should not be construed to have been received prior to the date of actual receipt except where a taxpayer turns his back upon income or does not choose to receive income which he could have if he chose".

Upon appeal, the Board's decision in the *Adams* case was affirmed. *Commissioner* v. *Adams*, C. C. A. 1, 54 Fed. (2d) 228. The Court there said (p. 229):

> "The case of *Commissioner* v. *Bingham, supra*, is clearly distinguishable from the present one, for the reason that the tax there in question was governed by the Revenue Act of 1921, in which section 201 (e) expressly provides that dividends 'shall be included in the gross income of the distributees as of the date when the cash or other property is unqualifiedly made subject to their demands,' which provision the Revenue Act of 1924 does not contain.
>
> The act of 1924 not only does not contain the above provision, but in section 213 (a) expressly provides that dividends 'shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under subdivision (b) of section 212,' with which exception we are not concerned.

1. We have pointed out that dividends may be constructively received wholly apart from a provision like that in Section 201 (e) of the 1921 Act. Note 1, *supra*, p. 20.

> The applicable provisions of section 213 (a) are not ambiguous; the langauge used clearly expresses the intention of Congress. Its intention, where the language of the act is unambiguous and its meaning plain, is to be gathered from the acts itself and not from what some member of the legislative body may have stated in committee or elsewhere. The language of this act speaks for itself; it does not call for construction. And on this ground alone, we think that the Board of Tax Appeals did not err in reaching the conclusion that it did."

In 1931 after the decision of the Board in the *Adams* case and prior to its affirmance by the First Circuit Court of Appeals, the Board decided the case of *Mary Miller Braxton*, 22 B. T. A. 128, which arose under the Revenue Act of 1926. That case is discussed in the Board's opinion in the two instant cases (R. 31). There again the Board divided. In the majority opinion, the *Adams* case was distinguished because of the special provision in the dividend resolution as to the mailing of the checks, nothing being said as to that part of the opinion in the *Adams* case dealing with the change made in the 1924 Act itself with respect to dividends. One member of the Board specially concurred, but upon the ground that there was no distinction between the *Adams* case and the *Braxton* case, and that the *Adams* case was in conflict with the decision of the Sixth Circuit in the *Bingham* case. Three members of the Board dissented without opinion. One member dissented, it was said, for the reasons set forth in the *Bingham* case and because the *Adams* case was distinguishable. The *Braxton* case was not appealed.

Subsequent to the decision of the First Circuit Court of Appeals in the *Adams* case, the Board decided *Effie B. Shearman*, 26 B. T. A. 716, under the 1928 Act. There the dividends were declared in 1928 and were payable on December 31, 1928, to stockholders of record "at the

close of business on that day". Checks dated December 31, 1928, were mailed on that date to the stockholders and were received by Mrs. Shearman on January 2, 1929. Following its decision in the *Braxton* case, the Board held the dividends taxable in 1928.

The Board seemed to regard the decision of the First Circuit Court of Appeals in the *Adams* case as limited entirely to the special provision in the dividend resolution, wholly ignoring what the court had said with reference to the effect of the omission from the 1924 Act of the special provisions of Section 201 (e) of the 1921 Act.

The *Braxton* case was followed by *Franklin J. Matchette,* 26 B. T. A. 909 (1924 Act). The *Braxton* and *Shearman* cases were held controlling. The *Matchette* case was not appealed.

Shearman v. *Commissioner,* CCA (2), 66 Fed. (2d) 256, affirming the Board, seems to accept the regulations as a correct exposition of the doctrine of constructive receipt as applied to dividends. This we challenge. The real question seems to us to be, whether apart from matters of nomenclature, dividends can be said to be actually or constructively received under the circumstances presented.

II.

THE DOCTRINE OF CONSTRUCTIVE RECEIPT IS NOT APPLICABLE.

We have set out in the Appendix the relevant provisions of the various Regulations issued under the various Acts upon the subject of constructive receipt. That doctrine is an administrative concept of the statutory word "received." But, as has been said by the Board (*Re Cowell,* 18 B. T. A. 997, 1001),

> "Unless it is kept within the penumbra of actual receipt, it will invade the field of accrual accounting, and this should not be permitted."

The case of *Re Brander,* 3 B. T. A. 231, is perhaps the leading Board case upon the subject. It was there said:

> "* * * This doctrine, as we have made clear in several appeals, is not to be applied lightly, but only in situations where it is clearly justifiable. When taxable income is consistently computed by a citizen on the basis of actual receipts, a method which the law expressly gives him the right to use, he is not to be defeated in his bona fide selection of this method by 'construing' that to be received of which in truth he has not had the use and enjoyment. Constructive receipt is an artificial concept which must be sparingly applied, lest it becomes a means for taxing something other than income and thus violating the Constitution itself.
>
> "Doubtless, however, there are clear cases of constructive receipt, such, for example, as that of the bond owner who chooses not to cash his coupon but to permit it to remain uncut in the possession of another. He will not be heard to say that the amount of the coupon is not his income because he did not in fact receive it. The receipt is entirely within his own control and disposition."

Upon occasions, as we have pointed out, dividends have been made the subject of the application of the

doctrine of constructive receipt, under circumstances warranting the application of that doctrine. *Hadley* v. *Commissioner,* App. D. C., 36 Fed. (2d) 543; *Brooks* v. *Commissioner,* C. C. A. 4, 35 Fed. (2nd) 178.

In those cases the dividends were actually credited to the stockholder's account upon the corporate books, along with salaries, rents, interest and other items due from the company, and the taxpayer had the right to draw and did draw indiscriminately against the amount standing in the account to his credit. It would seem apparent that under such circumstances the taxpayer had "received" the dividends for tax purposes.

In the case of the bond interest coupon maturing in a given year, the taxpayer has received during that year, and is in actual possession of, the symbol of the debt, namely, the coupon itself, in which case it may properly be regarded that the income or interest represented by the coupon has been "constructively" received as of the due date of the coupon. Such a case, however, is distinguishable from an ordinary case of interest merely accruing upon a debt which is unpaid. In the latter situation, such interest is not "received" merely because it is past due.

The essence of the doctrine of constructive receipt is that the fund is in fact within the control of the taxpayer and the failure to reduce the fund to actual possession is due to the taxpayer's own voluntary act or conduct. In other words "income should not be construed to have been received prior to the date of actual receipt except where a taxpayer turns his back upon income or does not choose to receive income which he could have if he chose." *Cecil Q. Adams,* 20 B. T. A. 243, 246.

A debt owing is obviously not of itself income received.

Payment is requisite. It is not competent, we submit, for the Commissioner, without statutory authority, to say that it is.

We think our position is supported by the general provisions of the regulations issued by the Commissioner other than as they specifically deal with the question of constructive receipt of dividends; and excepting those cases involving the 1921 Act. Art. 53, Reg. 45 (1918); Art. 52, Reg. 62 (1921); Art. 51, Reg. 65 (1924); Art. 51, Reg. 69 (1926); Art. 332, Reg. 74 (1928); Art. 332, Reg. 77 (1932).

It may be said by the government that the Petitioner's argument does not admit of the doctrine of constructive receipt under the 1924 and 1928 Acts. This claim is not sound. The doctrine of constructive receipt, whether with respect to dividends or any other species of income, is quite applicable under the 1924 and subsequent acts, wherever the circumstances are such as make the application of that doctrine proper. The cases heretofore referred to under some of the earlier acts in which the doctrine of constructive receipt has been applied to dividends is a sufficient answer to the government's claim. The Commissioner is endeavoring to single out dividends from all other species of income and subject them alone to special treatment under the guise of constructive receipt, something which can only be done by statute as in the case of the 1921 Act. We should like to know whether the government regards Sec. 201(e) of the 1921 Act as surplusage and whether it considers that the regulations issued under that act with reference to dividends would be valid, had Sec. 201(e) been omitted.

It is not necessary, we believe, that the Court determine any abstract question as to whether the wording of the Regulations under the 1924 and 1928 acts is or is not

faulty. The issue is not as to phraseology but is as to whether the dividends here involved were "constructively" received by petitioner at the times claimed by the Commissioner. We say that the issue is as to whether the dividends were constructively received for the reason that there is no claim that the dividends were *actually* received except as of the time when the dividend checks came to hand. If the same criterion as to constructive receipt holds in the case of dividends as holds in the case of other items of income, there was no constructive receipt by petitioner of the dividends here involved. Only upon such theory as is found in the 1921 Act can the Commissioner's claim be sustained.[1]

We venture to say that had Section 201 (e) been omitted from the 1921 act, no question would ever have arisen as to the correctness of the holding of the Board in the *Bingham* case to the effect that dividends are not income received in a given year merely because they are payable in that year and dividend checks are mailed out on December 31.

In considering the alleged administrative practice prior to 1921, the fact remains that in cases other than dividends, the Commissioner never claimed that the fact

1. The instances of constructive receipt referred to in this brief are by no means intended as all-inclusive. The bond coupon is the simplest illustration of constructive receipt. The taxpayer has in his possession the symbol of the debt. Even there, however, the rule is not arbitrary and will yield to the fact (*Re Southern Pacific Co. et al.* 21 B. T. A. 990). Payments made to a third party for or on account of the taxpayer are also illustrations of constructive receipt (*Re Strauss*, 2 B. T. A. 598; *Re Voyer*, 4 B. T. A. 1192; cf. *Black* v. *Bolen* (D. C.) 268 F. 42[illegible] I. T. 1846, C. B. II-2, p. 210; Art 70, Reg. 77 (1932)). The crediting of salaries and dividends and the like to the taxpayer's account upon the company books upon which the taxpayer is free to draw whenever he sees fit to do so is but one illustration of the rule. Questions of estoppel sometimes prevent the application of the doctrine. (*Re Moran*, 26 B. T. A. ..... Dec. #7761). Funds which are the subject matter of litigation are not income received (*Kales* v. *Woodworth* (D. C.) 20 F. (2d) 395; *Dodge* v. *United States*, 64 Ct. Cl. 178; *North American Oil Consolidated* v. *Burnett*, 286 U. S. 417, 423). The fiction must give way to the fact.

that income was due and payable and that checks in payment thereof had been mailed out constituted income received by the recipient. The holdings of the Board are to the contrary and the Commissioner has acquiesced therein. *Re Edmunds,* 1 B. T. A. 998; *Re Cremin,* 5 B. T. A. 1164; *Re Titus,* 2 B. T. A. 754.

In the *Edmunds* case, the corporation authorized the payment of additional compensation to the taxpayer. On December 31 the corporation issued its check in the required amount payable to the taxpayer and charged the same to him upon its books. It appeared that upon the day the check was issued, the corporation was amply able to make the payment and had ample funds in the bank for the payment of the check when presented. The Commissioner claimed that the amount represented by the check was taxable for the year in which the check issued. The Board reversed the Commissioner on the ground that the additional compensation was not received by the taxpayer until the following year when the check therefor came into his possession. The Commissioner acquiesced in this holding (C. B. IV-1, p. 2). The same holding was made in the *Cremin* case and the Commissioner again acquiesced. (C. B. VII-1, p. 8).

While it is true that the *Edmunds* case was decided in 1925 and the *Cremin* case in 1927, we cannot believe that the Commissioner would have acquiesced therein had the well established departmental practice prior thereto been as the Government now seem to claim. In the *Titus* case, a client sent a check to his attorney for services which had been billed in 1917 but which check was not actually received until 1918. The Board held upon the authority of the *Edmunds* case that the amount so paid was income for 1918. In that case the taxpayer was claiming a constructive receipt in 1917, which claim was over-

ruled. The Commissioner again acquiesced. (C. B. VII-1, p. 31).

In the instant cases the practice of the corporation was such as to preclude the receipt by any of its shareholders of the dividends until 1925 and 1929. (R. 20-22.) While we do not believe the cases should be disposed of on this narrow ground, yet if the *Adams* case is sustainable only because of its special features then, we submit, the instant cases are governed by a like rule. The effect of the practice was the same as the provision in the *Adams* case resolution for mailing the checks. However, the broad ground of the decision in the *Adams* case is the one for which we contend.

III.

THE COMMISSIONER MAY NOT BY ADMINISTRATIVE REGULATIONS CHANGE OR ENLARGE THE CLEAR MEANING OF THE STATUTE. THE REGULATIONS AS SOUGHT TO BE APPLIED TO THE INSTANT CASES ARE VOID.

The applicable statutes state explicitly that all items of income are to be included in the taxable period in which *received* by the taxpayer. The 1921 Act made a special rule as to dividends. That special rule in the 1921 statute was carried into the regulations issued under that statute verbatim. (Arts. 53, 1541; Reg. 62; App. pp. 29-30). Notwithstanding the omission of these special provisions in the 1924 and subsequent acts, the regulations issued in this respect under the 1921 Act were carried forward into the regulations under the later Acts without material change. Obviously, if the 1924 and subsequent acts materially changed the law as to reporting dividends from what it was under the 1921 Act, the regulations under the 1924 and subsequent acts to the extent as here applied, are in direct violation thereof, and are,

therefore void. While administrative construction of a statute may be looked to in order to resolve an ambiguity resort to such construction will not be permitted to create one. (*R. R. Commission* v. *C. B. & Q. R. Co.*, 257 U. S. 363). Where a statute is free from ambiguity then administrative construction thereof is immaterial, (*Swift, etc. Co.* v. *U. S.*, 105 U. S. 691; *Iselin* v. *U. S.*, 270 U. S. 245), no matter of how long standing such administrative construction may have been. (*U. S.* v. *Graham*, 110 U. S. 219; *U. S.* v. *Johnson*, 173 U. S. 363).

It may be that certain decisions of this court will be referred to as authority to the proposition that the reenactment of Section 213 (a) of the 1924 Act in 1926 and thereafter is a legislative approval of the regulation thereunder. cf. *Shearman* v. *Commissioner*, C. C. 2, 66 Fed. (2d) 256.

In *Brewster* v. *Gage*, 280 U. S. 327, the question was as to when the taxpayer had "acquired" certain property which he had received as residuary legatee. In other words, was the time of acquisition the date of the death of the decedent or the date of the actual distribution? As to personal property, the term is ambiguous. The regulations under earlier Acts had uniformly construed the statute to refer to the death of the decedent. This court held that there being an ambiguity in the statute, the practical interpretation of the Commissioner would not be disturbed, and that the substantial re-enactment in later Acts of the earlier statutory provisions was a legislative approval of the administrative construction.

Burnett v. *Thompson Oil and Gas Company*, 283 U. S. 301, involved the question as to the amount of depletion that could be taken in the case of oil properties under the 1918 Act. The statute provided for a reasonable allow-

ance for depletion to be in accord with rules and regulations to be prescribed by the Commissioner. This Court pointed out that the statute merely provided for a reasonable allowance and left it to the Commissioner to make the necessary regulations therefor. It was held that the re-enactment in later statutes of the same provision was persuasive that Congress approved the regulations which the Commissioner had prescribed.

In *Murphy Oil Company* v. *Burnett*, 287 U. S. 299, the question was whether bonus payments upon an oil lease were depletable under the 1918 act. The Regulations required such depletion. The Court held that the subsequent re-enactment of the depletion provisions of the 1918 act was an approval of the Regulations. As in the *Thompson Oil & Gas Company* case, *supra*, the statute provided for a reasonable allowance and left it to the Commissioner to prescribe the same by his rules and regulations.

Burnett v. *Brooks*, 288 U. S. 378, involved the question as to the right of Congress to tax certain intangible property belonging to an alien. The property consisted of bonds and stocks, etc., all of which were physically present in the United States. The Court reviewed the legislation upon the subject and earlier decisions of the Court and held that as a matter of construction, Congress intended to subject such property to tax, leaving the sole question remaining for decision as to whether Congress had the power to impose the tax. It appeared that administrative practice under similar conditions had been to subject such bonds to tax. It was accordingly said that the court would not question the intention of Congress, when the 1924 Act was enacted, that said property should be taxed; citing *Brewster* v. *Gage*, *supra*.

In *United States* v. *Dakota-Montana Oil Company*, 288 U. S. 459, a taxpayer claimed a deduction in its tax rate

for 1926 on account of a depletion allowance on account of the capitalized cost of preliminary development and drilling. The Commissioner refused the deduction, ruling that it was for depletion and not depreciation and was therefore included in the present statutory depletion allowance of 27½ per cent of gross income which the taxpayer had also deducted. The 1926 Act provided for depletion and for depreciation of improvements to be made under rules and regulations to be prescribed by the Commissioner. The Court reviewed the earlier Acts and the regulations thereunder and finally held that the re-enactment of these statutory provisions carried with it the prior administrative construction.

In *Massachusetts Mutual Life Insurance Company* v. *U. S.*, 288 U. S. 269, the insurance company attempted to report its income in part upon the cash receipts and disbursements basis and in part upon an accrual basis. The administrative construction had been to require all insurance companies to report upon the cash receipts basis. It was held that the re-enactment in the 1928 and 1932 Acts of the early provisions was an approval of the administrative construction of the earlier statutes.

Some of the above cases involve a statute which merely fixes a general standard leaving it to the Commissioner to apply the standard to specific cases. Cases like *Brewster* v. *Gage*, *supra*, are also different. The regulations here do not attempt so much a construction of the word "received," as an attempt to create a special rule as to dividends not applicable to other species of income. Whatever may be the power of the Commissioner to tax income upon the theory of constructive receipt, we contend that it is for the court in the final analysis to determine whether the doctrine of constructive receipt has been properly applied and that the

Commissioner has no right to single out dividends and subject them to special treatment upon some supposed theory of constructive receipt which is not applicable to all income alike. The 1924 and all subsequent Acts treat dividends and all other items of income in the same manner. It is not for the Commissioner to declare a different policy in that regard.

Where a statute is plain and unambiguous, it speaks for itself and the court will not examine into or consider its legislative history or committee reports thereon or the like. (*Caminetti* v. *U. S.*, 242 U. S. 470; *Bate Refrigerating Co.* v. *Sulzberger*, 157 U. S. 1; *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346; *Pennsylvania R. Co.* v. *International Coal Mining Co.*, 230 U. S. 320; *Commissioner* v. *Adams*, C. C. A. 1, 54 Fed. (2d) 228).

Conclusion.

The right of a taxpayer to report his income and pay tax thereon upon the cash receipts and disbursements basis has been secured to him by all of our income tax legislation in recent years with the sole exception of the 1921 Act in its special treatment of dividends. No taxpayer keeping his books upon the cash receipts and disbursements basis may be compelled to report his income or pay tax thereon upon the accrual basis or upon any other basis except as the statute directs. Nor is the taxpayer to be penalized by insisting upon exercising the right reserved to him by the law. By a process of administrative legislation, we respectfully submit, the Commissioner has burdened petitioner with an additional tax liability of more than a hundred thousand dollars for the calendar year 1924 and more than twenty-six hundred dollars for the calendar year 1929, although it stands

admitted that this asserted liability is founded not upon the actual receipt of income by petitioner but upon the ground that petitioner "constructively" received such income in those years. The actualities of the case are that the income was received in 1925 and 1930. The fiction indulged in by the Commissioner throws the income into earlier years with the resulting additional and burdensome liability. We doubt if any case can be found involving any species of income other than dividends to which the Commissioner has attempted to apply the doctrine of constructive receipt under the circumstances shown here to exist. The special rule which he has attempted to create as to dividends alone is inconsistent with his rule generally as to other kinds of income. That effort on the part of the Commissioner, we submit, and the holdings of the Board thereon, are the result of a misunderstanding of the legal effect of Section 201 (e) of the 1921 Act and of the decision of the Sixth Circuit in the *Bingham* case.

Whatever may have been the intention when Section 201(e) was put into the 1921 act, we must take it as we find it and give to it that meaning which its language requires. The 1924 and subsequent acts having changed the law in that particular, the taxability of dividends must now be determined upon precisely the same basis as in the case of all other species of income. This is not, however, the effect of the Regulations issued under the 1924 and subsequent acts and to that extent they are ineffective.

We respectfully urge that the judgments of the court below and of the Board be reversed.

Respectfully submitted,

LELAND K. NEEVES,
Counsel for Petitioner.

APPENDIX.

1918 ACT—REGULATIONS 45.

ARTICLE 52. *When included in gross income.*—Gains profits and income are to be included in the gross income for the taxable year in which they are received by the taxpayer, unless they are included when they accrue to him in accordance with the approved method of accounting followed by him. See articles 21-24. * * *

ARTICLE 53. *Income not reduced to possession.*—Income which is credited to the account of or set apart for a taxpayer and which may be drawn upon by him at any time is subject to tax for the year during which so credited or set apart, although not then actually reduced to possession. To constitute receipt in such a case the income must be credited to the taxpayer without any substantial limitation or restriction as to the time or manner of payment or condition upon which payment is to be made. A book entry, if made, should indicate an absolute transfer from one account to another. If the income is not credited, but is set apart, such income must be unqualifiedly subject to the demand of the taxpayer. Where a corporation contingently credits its employees with bonus stock, but the stock is not available to such employees until the termination of five years of employment, the mere crediting on the books of the corporation does not constitute receipt. The distinction between receipt and accrual must be kept in mind. Income may accrue to the taxpayer and yet not be subject to his demand or capable of being drawn on or against by him.

ARTICLE 54. *Examples of constructive receipt.*—Where interest coupons have matured, but have not been cashed, such interest payment, though not collected when due and payable, is nevertheless available to the taxpayer and should therefore be included in his gross income for the year during which the coupons matured. This is so if the coupons are exchanged for other property instead of eventually being cashed. *Dividends on corporate stock are subject to tax when set apart for the stockholder,*

although not yet collected by him. See section 201 of the statute and articles 1541-1549. * * *

ARTICLE 1541. *Dividends.*— * * * *The mere declaration of a dividend is not a distribution. Dividends are income and are taxed at the rates for the year in which paid, regardless of when the earnings or profits out of which they were paid were accumulated.*

1921 ACT—REGULATIONS 62.

ARTICLE 51. *When included in gross income.*—Gains, profits and income are to be included in the gross income for the taxable year in which they are received by the taxpayer, unless they are included when they accrue to him in accordance with the approved method of accounting following by him. See articles 21-24; as to dividends, see section 201(e) and articles 1541-1549. * * *

ARTICLE 52. *Income not reduced to possession.*—Income which is credited to the account of or set apart for a taxpayer and which may be drawn upon by him at any time is subject to tax for the year during which so credited or set apart, apart, although not then actually reduced to possession. To constitute receipt in such a case the income must be credited to the taxpayer without any substantial limitation or restriction as to the time or manner of payment or condition upon which payment is to be made. A book entry, if made, should indicate an absolute transfer from one account to another. If the income is not credited, but is set apart, such income must be unqualifiedly subject to the demand of the taxpayer. Where a corporation contingently credits its employees with bonus stock, but the stock is not available to such employees until some future date, the mere crediting on the books of the corporation does not constitute receipt.

ARTICLE 53. *Examples of constructive receipt.*—When interest coupons have matured and are payable, but have not been cashed, such interest payment, though not collected when due and payable, is nevertheless available to the taxpayer and should therefore be included in his gross income for the year during which the coupons matured. This is true if the coupons are exchanged for other property instead of eventually being cashed. Defaulted coupons are income for the year in which paid.

Dvidends on corporate stock are subject to tax when unqualifiedly made subject to the demand of the stockholder. See section 201 of the statute and articles 1541-1549. * * * Interest credited on savings bank deposits, even though the bank nominally have a rule, seldom or never enforced, that it may require so many days' notice in advance of cashing depositors' checks, is income to the depositor when credited. * * *

ARTICLE 1541. *Dividends.* * * * *A taxable distribution made by a corporation to its stockholders or members shall be included in the gross income of the distributees when the cash or other property is unqualifiedly made subject to their demands. See article 53.*

1924 ACT—REGULATIONS 65.

ARTICLE 50. *When included in gross income.*—Gains, profits and income are to be included in the gross income for the taxable year in which they are received by the taxpayer, unless they are included when they accrue to him in accordance with the approved method of accounting followed by him. See articles 21-24. * * *

ARTICLE 51. *Income not reduced to possession.*—Income which is credited to the account of or set apart for a taxpayer and which may be drawn upon by him at any time is subject to tax for the year during which so credited or set apart, although not then actually reduced to possession. To constitute receipt in such a case the income must be credited to the taxpayer without any substantial limitation or restriction as to the time or manner of payment or condition upon which payment is to be made. A book entry, if made, should indicate an absolute transfer from one account to another. If the income is not credited, but is set apart, such income must be unqualified subject to the demand of the taxpayer. Where a corporation contingently credits its employees with bonus stock, but the stock is not available to such employees until some future date, the mere crediting on the books of the corporation does not constitute receipt.

ARTICLE 52. *Examples of constructive receipt.*—When interest coupons have matured and are payable, but have not been cashed, such interest payment, though not collected when due and payable, is nevertheless available to the taxpayer and should therefore be included in his

gross income for the year during which the coupons matured. This is true if the coupons are exchanged for other property instead of eventually being cashed. Defaulted coupons are income for the year in which paid. *Dividends on corporate stock are subject to tax when unqualifiedly made subject to the demand of the stockholder.* * * * Interest credited on savings bank deposits, even though the bank nominally has a rule, seldom or never enforced, that it may require so many days' notice in advance of cashing depositors' checks, is income to the depositor when credited. * * *

ARTICLE 1541. *Dividends.* * * * *A taxable distribution made by a corporation to its shareholders shall be included in the gross income of the distributees when the cash or other property is unqualifiedly made subject to their demands. See article 52.*

1926 ACT—REGULATIONS 69.

ARTICLE 50. *When included in gross income.*—Gains, profits and income are to be included in the gross income for the taxable year in which they are received by the taxpayer, unless they are included as of a different period in accordance with the approved method of accounting followed by him. See articles 21-24. * * *

ARTICLE 51. *Income not reduced to possession.*—Income which is credited to the account of or set apart for a taxpayer and which may be drawn upon by him at any time is subject to tax for the year during which so credited or set apart, although not then actually reduced to possession. To constitute receipt in such a case the income must be credited to the taxpayer without any substantial limitation or restriction as to the time or manner of payment or condition upon which payment is to be made. A book entry, if made, should indicate an absolute transfer from one account to another If the income is not credited, but is set apart, such income must be unqualifiedly subject to the demand of the taxpayer. Where a corporation contingently credits its employees with bonus stock, but the stock is not available to such employees until some future date, the mere crediting on the books of the corporation does not constitute receipt.

ARTICLE 52. *Examples of constructive receipt.*—When interest coupons have matured and are payable, but have not been cashed, such interest, though not collected when due and payable, is nevertheless available to the taxpayer and should therefore be included in his gross income for the year during which the coupons matured. This is true if the coupons are exchanged for other property instead of eventually being cashed. Defaulted coupons are income for the year in which paid. *Dividends on corporate stock are subject to tax when unqualifiedly made subject to the demand of the shareholder.* * * * Interest credited on saving bank deposits, even though the bank nominally has a rule, seldom or never enforced, that it may require so many days' notice before withdrawals are permitted, is income to the depositor when credited. * * *

ARTICLE 1541. *Dividends.* * * * *A taxable distribution made by a corporation to its shareholders shall be included in the gross income of the distributees when the cash or other property is unqualifiedly made subject to their demands. See article 52.*

1928 ACT—REGULATIONS 74.

ARTICLE 331. *When included in gross income.*—Gains, profits, and income are to be included in the gross income for the taxable year in which they are received by the taxpayer, unless they are included as of a different period in accordance with the approved method of accounting followed by him. See articles 321-323. * * *

ARTICLE 332. *Income not reduced to possession.*—Income which is credited to the account of or set apart for a taxpayer and which may be drawn upon by him at any time is subject to tax for the year during which so credited or set apart, although not then actually reduced to possession. To constitute receipt in such a case the income must be credited or set apart to the taxpayer without any substantial limitation or restriction as to the time or manner of payment or condition upon which payment is to be made, and must be made available to him so that it may be drawn at any time, and its receipt brought within his own control and disposition. A book entry, if made, should indicate an absolute transfer from one account to another. Where a corporation contin-

gently credits its employees with bonus stock, but the stock is not available to such employees until some future date, the mere crediting on the books of the corporation does not constitute receipt.

ARTICLE 333. *Examples of constructive receipt.*—When interest coupons have matured and are payable, but have not been cashed, such interest, though not collected when due and payable, shall be included in gross income for the year during which the coupons mature, unless it can be shown that there are no funds available for payment of the interest during such year. The interest shall be included in gross income even though the coupons are exchanged for other property instead of eventually being cashed. Defaulted coupons are income for the year in which paid. *Dividends on corporate stock are subject to tax when unqualifiedly made subject to the demand of the shareholder.* * * * Interest credited on savings bank deposits, even though the bank nominally has a rule, seldom or never enforced, that it may require so many days' notice before withdrawals are permitted, is income to the depositor when credited. * * *

ARTICLE 621. *Dividends.*—* * * *A taxable distribution made by a corporation to its shareholders shall be included in the gross income of the distributees when the cash or other property is unqualifiedly made subject to their demands. See article 333.*

1932 ACT—REGULATIONS 77.

ARTICLE 331. *When included in gross income.*—Gains, profits, and income are to be included in the gross income for the taxable year in which they are received by the taxpayer, unless they are included as of a different period in accordance with the approved method of accounting followed by him. See articles 321-323. * * *

ARTICLE 332. *Income not reduced to possession.*—Income which is credited to the account of or set apart for a taxpayer and which may be drawn upon by him at any time is subject to tax for the year during which so credited or set apart, although not then actually reduced to possession. To constitute receipt in such a case the income must be credited or set apart to the taxpayer

without any substantial limitation or restriction as to the time or manner of payment or condition upon which payment is to be made, and must be made available to him so that it may be drawn at any time, and its receipt brought within his own control and disposition. A book entry, if made, should indicate an absolute transfer from one account to another. Where a corporation contingently credits its employees with bonus stock, but the stock is not available to such employees until some future date, the mere crediting on the books of the corporation does not constitute receipt.

ARTICLE 333. *Examples of constructive receipt.* — When interest coupons have matured and are payable, but have not been cashed, such interest, though not collected when due and payable, shall be included in gross income for the year during which the coupons mature, unless it can be shown that there are no funds available for payment of the interest during such year. The interest shall be included in gross income even though the coupons are exchanged for other property instead of eventually being cashed. Defaulted coupons are income for the year in which paid. *Dividends on corporate stock are subject to tax when unqualifiedly made subject to the demand of the shareholder.* * * * Interest credited on savings bank deposits, even though the bank nominally has a rule, seldom or never enforced, that it may require so many days' notice before withdrawals are permitted, is income to the depositor when credited. * * *

ARTICLE 621. *Dividends.* — * * * *A taxable distribution made by a corporation to its shareholders shall be included in the gross income of the distributees when the cash or other property is unqualifiedly made subject to their demands. See article 333.*